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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA
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11 UNITED STATES OF AMERICA,
12 Plaintiff,

IN EQUITY NO. C-125
SUBFILE NO. C-125B

13 WALKER RIVER PAIUTE TRIBE,
14 Plaintiff-Intervenor,

ORDER

15 v.

16 WALKER RIVER IRRIGATION DISTRICT,
17 et al.,

Defendants.

18 WALKER RIVER PAIUTE TRIBE,
19 Counterclaimant,

20 UNITED STATES OF AMERICA,
21 Counterclaimant-Intervenor,

22 v.

23 WALKER RIVER IRRIGATION DISTRICT,
24 Counterdefendant,

25 STATE OF NEVADA,
26 Counterdefendant-Intervenor.

The United States (hereinafter U.S.) and the Walker River
Paiute Tribe (hereinafter Tribe) have filed separate but

1 substantively similar counterclaims against the Walker River
2 Irrigation District. The State of Nevada has intervened as a
3 Counterdefendant (Doc. #7).

4 By order filed October 27, 1992, this Court deemed that
5 what the Tribe and the U.S. designated counterclaims were in
6 reality cross-claims and would be allowed to proceed on that basis.
7 (Doc. #15). For clarity's sake we will continue to refer to the
8 Tribe's and the U.S.'s pleadings as counterclaims although they are
9 proceeding as cross-claims.

10 The substance of the counterclaims comprising subfile
11 number C-125-B, are claims by the Tribe and the U.S. requesting
12 this Court to recognize additional water rights to waters from the
13 Walker River and its tributaries for the Tribe.

14 HISTORY

15 This Court entered a final decree establishing the rights
16 to the waters of the Walker River as between the United States
17 acting for the Tribe and competing claimants in 1936. United
18 States v. Walker River Irrigation District, 1 F.Supp. 158 (D.Nev.
19 1935). On appeal the Ninth Circuit reversed some of the District
20 Court's holdings. United States v. Walker River Irrigation
21 District, 104 F.2d 334 (9th Cir. 1939). The decree was amended to
22 conform to the mandate from the Court of Appeals on April 24, 1940.

23 The final decree determined various water rights of
24 competing claimants to waters from the Walker River, including a
25 determination that the United States, for the Walker River Paiute
26 Tribe, was entitled to the continuous flow of 26.25 cubic feet of

1 water per second, to be diverted from the Walker River during the
2 irrigation season of one hundred and eighty days for the irrigation
3 of two thousand one hundred acres of land on the reservation.
4 Among the rights to the use of water adjudicated by the decree were
5 determinations of the quantity of water a claimant was entitled to,
6 the priority date of such entitlement and the uses of water upon
7 which the claim was founded and the land on which the water was to
8 be used.

9 The decree adjudicated only the rights of the claimants
10 to the surface waters of the Walker River and did not concern
11 itself in any way with underground water rights.

12 The current counterclaims of the U.S. and the Tribe seek
13 to establish new and additional water rights. Both parties claim
14 a new right to store waters drawn from the Walker River at Weber
15 dam, rather than being limited to immediate use of the water. Both
16 parties also seek a right to use waters from the Walker River on
17 reservation lands not contemplated by the decree. Apparently, the
18 Tribe was restored to possession of additional reservation lands in
19 1936, after the close of evidence in the original litigation.
20 Therefore, the final decree does not allow the Tribe to use water
21 drawn from the Walker River on the new reservation lands, but only
22 on the old lands which were currently in the possession of the
23 Tribe at the close of evidence. Finally, it appears that the U.S.
24 and the Tribe seek a determination that when the new reservation
25 lands were restored to the Tribe in 1936, a federal implied
26 reservation of water rights was also granted. Thus, the U.S. and

1 the Tribe are seeking a determination that they are entitled to
2 additional waters from the Walker River, for use on the restored
3 lands.

4 **DISCUSSION**

5 The question currently before the Court is whether our
6 order of October 27, 1992 (Doc. #15) requiring that "all claimants
7 to the water of Walker River and its tributaries must be joined as
8 parties to the [Tribe's counterclaim,]" extends to groundwater
9 claimants and users in the Walker River basin.

10 The U.S. originally filed a Motion for Instructions and
11 Order (Doc. #23) requesting the Court to clarify its prior order
12 (Doc. #15). In the Motion for Instructions and Order (Doc. #23)
13 the U.S. took no position, but merely indicated its need for
14 clarification. Subsequently, the Tribe in its Response (Doc. #26)
15 took the position that such groundwater claimants must be joined as
16 necessary parties pursuant to Fed.R.Civ.P. 19. Thereafter, the
17 U.S. in its Reply (Doc. #29) abandoned its neutral posture and also
18 took the position that groundwater claimants in the Walker River
19 basin must be joined as necessary parties. ¹

20 _____
21 ¹ Federal Rule of Civil Procedure 19 requires
that

22 [a] person who is subject to service of process and whose
23 joinder will not deprive the court of jurisdiction over the
24 subject matter of the action shall be joined as a party in the
25 action if (1) in the person's absence complete relief cannot
26 be accorded among those already parties, or (2) the person
claims an interest relating to the subject of the action and
is so situated that the disposition of the action in the
person's absence may (i) as a practical matter impair or
impede the person's ability to protect that interest or (ii)
leave any of the persons already parties subject to a
substantial risk of incurring double, multiple, or otherwise

1 The U.S. and the Tribe assert that the groundwaters of
2 the Walker River basin are hydrologically connected to and are part
3 of a single unitary water supply with the surface waters of the
4 Walker River and its tributaries. Based on this assertion, the
5 U.S. and the Tribe speculate that increased groundwater use will
6 eventually compete with surface water use, in that use of one
7 source of supply necessarily comes at a loss to the other. On this
8 basis, the U.S. and the Tribe assert that all water in the Walker
9 River Basin forms a single res and to do full justice in equity,
10 all claimants to water from that single res, be they ground or
11 surface water claimants, must be joined.

12 **A. CLAIM TO GROUNDWATER RIGHTS**

13 Although it is not clearly alleged in the Counterclaim of
14 the U.S. or the Tribe, it appears that the U.S. at least
15 contemplates a possibility that its counterclaim seeking additional
16 water rights for the restored lands encompasses a claim to
17 groundwater rights. See, U.S. Reply, (Doc. #29) at pp. 5-6.

18 The U.S. never plainly states that it is seeking
19 groundwater rights. Rather the U.S. states that if "investigations
20 indicate that groundwater will be necessary to fulfill the purposes
21 of the federal reservation of these [restored] lands, then the
22 United States, and presumably the Tribe, fully intend to assert
23 rights to the groundwater. . . ." Id. at p. 6, ln. 7-10.

24 A possible future claim by the U.S. and/or the Tribe to
25 groundwater rights is not sufficient to justify current joinder

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 inconsistent obligations by reason of the claimed interest.

1 into this litigation of all groundwater claimants in the Walker
2 River basin. Mere speculation by the U.S. is insufficient to
3 justify such joinder. See, ARMCO Steel Corp. v. United States, 490
4 F.2d 688, 690 (8th Cir. 1974) (district court erred in ordering
5 joinder on hypothetical state of facts). At such time as the U.S.
6 and/or the Tribe do assert claims to groundwater rights, it may be
7 necessary to join other parties, but at this time the mere
8 possibility is insufficient to require joinder under Rule 19.

9 Without deciding this issue at this time, the Court notes
10 that even if a claim to groundwater rights was currently asserted,
11 the U.S. has alleged no reason why joinder of all groundwater
12 claimants in the Walker River basin is required. While there has
13 been some indication in supporting documents (see exhibits attached
14 to Doc. #29) that groundwater sources are hydrologically connected
15 to each other and to the Walker River, there is nothing to indicate
16 the extent of this connection is such that withdrawal of
17 groundwater on the restored reservation lands will have any effect
18 on surrounding groundwater claimants.

19 All that is offered is speculation. It is possible that
20 groundwater withdrawal on the reservation lands will affect other
21 groundwater claimants, but it is a truism that nearly anything is
22 possible. The U.S. must offer more than a mere possibility to
23 justify joinder under Fed.R.Civ.P. 19.

24 For the above reasons, the potential claim by the U.S.
25 and/or the Tribe that they are entitled to groundwater rights is
26

1 insufficient to justify joinder under Rule 19 of all groundwater
2 claimants in the Walker River basin.

3 **B. CLAIMS FOR ADDITIONAL WATER RIGHTS**

4 As noted in our previous order (Doc. #15),

5 [i]n this case the Tribe and the United States
6 want the Court to recognize additional water
7 rights for the Tribe and integrate these
8 rights into the Decree. Such a recognition
9 might have the effect of reducing the water
10 allocated to other federal rights holders or
11 altering the priority which their allocation
is given. Such a recognition may also give
the Tribe's newly recognized rights priority
over claimants who acquired their rights
through a state permit. Thus, the claimants
to the water of the Walker River clearly have
an interest in the action.

12 Order, (Doc. #15) p. 5, ln. 22- p. 6, ln. 4.

13 Therefore, the Court ordered "[i]n accordance with Rule
14 19, all claimants to the water of Walker River and its tributaries
15 must be joined as parties to the claim." Id. at p. 6, ln. 14-16.

16 The Court's order certainly appears clear in its intent
17 that only claimants to the water of Walker River and its
18 tributaries, need be joined.

19 **1. Surface and Ground Waters are Separate but Related
20 Resources**

21 The Court throughout the course of this litigation, has
22 considered ground water separately from surface water. Nevada
23 state law treats surface and ground waters as separate although
24 related resources. See e.g., NRS ch. 533 & 534; see also
25 Cappaert v. United States, 426 U.S. 128, 142 (1975) (Supreme Court
26 noting that Nevada itself may recognize the potential
interrelationship between surface and ground water since Nevada

1 applies the law of prior appropriation to both.) Several specific
2 statutes in these chapters indicate that under state law, competing
3 claims of ground and surface water claimants might require joinder
4 of all the claimants to settle the competing water claims. See
5 e.g., NRS §§ 533.240, 534.015 & 534.100-534.120.

6 2. State Law is Inapplicable

7 The requirements and procedures of state law are however,
8 inapplicable in this action. As the Supreme Court reaffirmed in
9 Cappaert v. United States, 426 U.S. 128, 145 (1975), a federal
10 implied-reservation-of-water-rights and federal water rights in
11 general "are not dependent upon state law or state procedures[.]"
12 The U.S. and the Tribe assert that the additional water rights they
13 are now claiming were impliedly reserved.

14 [W]hen the Federal Government withdraws its
15 land from the public domain and reserves it
16 for a federal purpose, the Government, by
17 implication, reserves appurtenant water then
18 unappropriated to the extent needed to
19 accomplish the purpose of the reservation. In
so doing the United States acquires a reserved
right in unappropriated water which vests on
the date of the reservation and is superior to
the rights of future appropriators. . . . The
doctrine applies to Indian reservations[.]

20 Id. at 138. The Court also held that the doctrine applies to
21 both surface and underground supplies of water. Id. at 142-43.

22 The only limit on the Federal Government's power to
23 impliedly reserve water rights appurtenant to land reserved to a
24 federal purpose is that the water reserved must be for the federal
25 purpose and can only be reserved to the extent it is
26 unappropriated. Thus, the doctrine of federal implied-reservation-

1 of-water-rights recognizes the supremacy of previously vested water
2 rights.

3 **3. Federally Reserved Water Rights are Not Balanced**
4 **Against Competing Claims and Interests in Water**

5 Last, the doctrine of federally reserved water rights
6 does not include any equitable principle calling for a balancing of
7 the competing (non-federal) rights. Id. at 138.

8 In determining whether there is a federally
9 reserved water right implicit in a federal
10 reservation of public land, the issue is whether
11 the Government intended to reserve unappropriated
and thus available water. Intent is inferred if
the previously unappropriated waters are necessary
to accomplish the purposes for which the
reservation was created.

12 Id. at 139. Where there is an implied reservation of water rights,
13 the United States is entitled to the full use of the reserved
14 waters (to the extent not previously appropriated) and the interest
15 of subsequent appropriators and users of water are not entitled to
16 consideration or balancing as against the federal right. See, id.

17 **4. Fed.R.Civ.P. 19 Might Still Require Joinder**

18 Despite the fact that state law is inapplicable and that
19 subsequent appropriators of water would not be entitled to an
20 equitable balancing of their interests as against the United
21 States' interest, Fed.R.Civ.P. 19 might require joinder of ground
22 water claimants.

23 Joinder of the ground water claimants would be required
24 if: (1) in their absence complete relief could not be accorded
25 among those already parties, or; (2) their claims to groundwater
26 relate to the subject of this action (the U.S. and Tribe's claims

1 to waters from the Walker River) and proceeding without the
2 groundwater claimants might (i) as a practical matter impair or
3 impede their ability to protect their interests or (ii) leave any
4 of the current parties subject to a risk of multiple or
5 inconsistent obligations. Fed.R.Civ.P. 19(a).

6 The groundwater claimants are necessary to accord
7 complete relief to those already parties only if their water rights
8 somehow affect the water rights of the parties. Likewise, their
9 claims to groundwater relate to the claims to waters from the
10 Walker River only if the claims are somehow related, or
11 interdependent.

12 Thus, joinder of the groundwater claimants is required
13 under Rule 19 only if groundwater claims and rights somehow affect
14 the water rights of the parties who have or claim rights to the
15 waters of the Walker River, or vice versa.

16 **5. No Adequate Relationship is Alleged**

17 As discussed previously, The U.S. and the Tribe have only
18 managed to indicate that there is some degree of hydrological
19 connection between the surface waters of the Walker River and the
20 ground waters of the Walker River basin. Establishing the
21 existence of such a connection merely establishes the possibility
22 that surface water rights will come into conflict and competition
23 with ground water rights. Numerous other factors must also be
24 considered in determining if there is any likelihood of conflict
25 between the surface and groundwater claimants.
26

1 If there were any currently ascertainable conflict such
2 might be the basis of new litigation. Neither the U.S. nor the
3 Tribe indicate that there is any current conflict between surface
4 and ground water claimants.

5 In light of the fact that the additional water rights
6 claimed by the U.S. and the Tribe will in all likelihood be small
7 in relation to the total amount of water appropriated from the
8 Walker River, it is unreasonable to assume that these additional
9 water rights will be the figurative straw that breaks the camel's
10 back. Without more specific allegations, this Court will not
11 assume the claimed right to additional water from the Walker River
12 will tip the scales and result in competition between surface and
13 ground water claimants.

14 All that the U.S. and the Tribe have provided is a basis
15 for speculation. Mere speculation is insufficient to require
16 joinder, see, ARMCO v. Steel Corp. v. United States, 490 F.2d 688,
17 690 (8th Cir. 1974), of all ground water claimants in the Walker
18 River basin in this litigation which focuses primarily on competing
19 claims to the limited surface waters of the Walker River and its
20 tributaries.

21 For the above reasons, the claim that surface and
22 groundwater users are or will be in competition for waters
23 comprising a single res is speculative and insufficient to require
24 joinder under Rule 19 of groundwater claimants located in the
25 Walker River basin.
26

IT IS FURTHER ORDERED that to the extent the United States' motion for instructions (Doc. #23) became a motion for joinder (see Doc. #29) under Fed.R.Civ.P. 19 and was joined in as such by the Walker River Paiute Tribe (see Doc. #26), said motions are DENIED.

Edward C. Reed
UNITED STATES DISTRICT JUDGE